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IN THE COURT OF APPEALS OF INDIANA

Logansport/Cass County Airport Authority,

Appellant-Plaintiff,

v.

Jerra Kochenower, Barry Heinley, James Brown, Joseph Robert Morsman, Robert Allen James, James C. Mizell, BNY Mellon, Unknown Members, Shareholders, Officers, Partners, Sole Proprietors, or Other Affiliates of Any Other Defendant,

Appellees-Defendants.

May 3, 2021

Court of Appeals Case No. 20A-PL-2143

Appeal from the Cass Superior Court

The Honorable Lisa L. Swaim, Judge

The Honorable Thomas C. Perrone, Senior Judge

Trial Court Cause No. 09D02-1909-PL-52

Najam, Judge.

Statement of the Case

[1] Logansport/Cass County Airport Authority (the "Airport Authority") appeals the trial court's grant of Jerra Kochenower's Trial Rule 60(B) motion to set aside default judgment. The Airport Authority raises the following two issues for our review:

1. Whether the trial court erred as a matter of law when it relied on unverified and otherwise not-authenticated documents in setting aside the default judgment.

2. Whether the trial court abused its discretion when it set aside the default judgment.

[2] We affirm.

Facts and Procedural History

[3] On December 27, 2018, the Airport Authority issued bonds in the principal amount of $950,000 with Bank of New York Mellon ("BNY Mellon") as the paying agent. On July 5, 2019, ten days before the first installment payment of $64,811.50 was due, BNY Mellon emailed the Airport Authority an invoice for that amount. However, an unknown third party intercepted that invoice and altered its contents, which resulted in the Airport Authority's first payment being sent not to BNY Mellon but to a Chase Bank account. The Airport Authority later determined that that Chase Bank account had been opened in Kochenower's name. On July 10, the holder of the Chase Bank account issued

wire transfer instructions for the stolen funds to several other third parties. The holder of the account then closed the account.

[4] On July 15, the Airport Authority discovered the theft. Chase Bank informed the Airport Authority's bank that the stolen funds could not be returned because the account had been closed. However, on August 19, Chase Bank was able to return $9,994 to the Airport Authority. The remaining stolen funds thus totaled $54,817.50.

[5] On September 12, the Airport Authority filed its complaint alleging unknown defendants had knowingly or intentionally exerted unauthorized control over the Airport Authority's property with the intent to deprive the Airport Authority of the value or use of that property, which constituted theft pursuant to Indiana Code Section 35-43-4-2. The Airport Authority sought "three times the amount of its actual damages, costs of this action, reasonable attorney's fees," and other related expenses. Appellant's App. Vol. 2 at 19.

[6] After discovery with Chase Bank, the Airport Authority filed its amended complaint in which it specifically named the alleged perpetrators, including Kochenower. On February 21, the Airport Authority served process on Kochenower at his home address in Colorado Springs, Colorado. Kochenower's appearance and answer were due by March 16. Kochenower did not file an appearance or answer during that time.

[7] Thereafter, the Airport Authority filed its Motion for Default Judgment, which the court granted.[1] The court's default judgment awarded the Airport Authority $164,452.50 in damages, $12,900 in attorney's fees, and $296.36 in court costs.

[8] On June 2, the trial court received a letter from Kochenower. In that letter, Kochenower stated that he had been the victim of identity theft and that he had never opened the suspect Chase Bank account. Included with his letter were an incident report apparently from the Colorado Springs Police Department for the alleged identity theft and a letter apparently from Chase Bank that stated Kochenower did not open the account used to defraud the Airport Authority. Additionally, Kochenower stated in his letter to the court that he did not follow up on the Airport Authority's complaint because he had presented the complaint to Chase Bank in support of his claim of identity fraud and "Chase Bank said they were going to take care of it." Appellant's App. Vol. 2 at 35. The letter ended with "Your Honor, clear me of this." *Id.*

[9] The trial court concluded that Kochenower's letter was a motion to set aside the default judgment under Indiana Trial Rule 60(B), and the court set the matter for a hearing. Following argument at that hearing, the court granted

[1] The default judgment extended to the other defendants, but they did not join Kochenower's motion to set aside, and they do not participate in this appeal.

Kochenower's motion and set aside the default judgment pursuant to Trial Rule 60(B)(1). This appeal ensued.

Discussion and Decision

Overview

[10] The Airport Authority alleges the trial court erred when it granted Kochenower's Trial Rule 60(B) motion to set aside the default judgment. Indiana Trial Rule 60(B)(1) states that "a judgment by default" may be set aside based on a party's "mistake, surprise, or excusable neglect" if the motion is filed within one year of the judgment[2] and the moving party "allege[s] a meritorious claim or defense." "A motion under Rule 60(B)(1) does not attack the substantive, legal merits of a judgment, but rather addresses the procedural, equitable grounds justifying the relief from the finality of a judgment." *KWD Industrias SA DE CV v. IPM LLC*, 129 N.E.3d 276, 281 (Ind. Ct. App. 2019) (citing *Kmart v. Englebright*, 719 N.E.2d 1249, 1254 (Ind. Ct. App. 1999), *trans. denied*).

[11] Our Supreme Court has stated that a default judgment

> is not generally favored, and *any doubt of its propriety must be resolved in favor of the defaulted party*. It is an extreme remedy and is available only where that party fails to defend or prosecute a

[2] It is undisputed that Kochenower filed his Rule 60(B) motion within one year.

> suit. It is not a trap to be set by counsel to catch unsuspecting litigants.

Allstate Ins. Co. v. Watson, 747 N.E.2d 545, 547 (Ind. 2001) (emphasis added; internal quotation marks and citations omitted).

[12] On appeal, the Airport Authority contends that the trial court erred when it set aside the default judgment for two reasons. First, the Airport Authority asserts that the trial court erroneously interpreted Trial Rule 60(B) to allow the submission of inadmissible evidence in support of a motion to set aside a default judgment. Second, the Airport Authority argues that, even if the court properly considered Kochenower's submissions, those submissions were insufficient to satisfy the requirements of Trial Rule 60(B)(1). We address each argument in turn.

Issue One: Whether the Moving Party under Trial Rule 60(B) Must Submit Admissible Evidence

[13] The Airport Authority first alleges the trial erred when it granted Kochenower's Rule 60(B) motion because Kochenower failed to submit admissible evidence in support of his asserted meritorious defense. The Airport Authority's argument on this issue is that the trial court misapplied or misinterpreted Trial Rule 60(B). We review such questions *de novo*. *Morrison v. Vasquez*, 124 N.E.3d 1217, 1219 (Ind. 2019).

[14] Again, Indiana Trial Rule 60(B) provides that a party moving for relief for "mistake, surprise, or excusable neglect" must "allege a meritorious claim or

defense." Concerning the meritorious defense requirement, the Indiana Supreme Court has said that

> Rule 60(B)'s requirement of a meritorious defense . . . merely requires a *prima facie* showing of a meritorious defense, that is, a showing that "will prevail until contradicted and overcome by other evidence." The movant need only "present evidence that, if credited, demonstrates that a different result would be reached if the case were retried on the merits and that it is unjust to allow the judgment to stand."

Outback Steakhouse of Fla., Inc. v. Markley, 856 N.E.2d 65, 73-74 (Ind. 2006) (emphasis omitted) (quoting *Smith v. Johnston*, 711 N.E.2d 1259, 1265 (Ind. 1999)).

[15] Our Supreme Court has not held that the meritorious claim or defense requirement means that the moving party's submission must be in an admissible form at the time of the Rule 60(B) motion. Indeed, in *Outback Steakhouse*, the Court relied on a treatise for the proposition that Federal Rule of Civil Procedure 60(b) requires the moving party to simply show that "vacating the judgment will not be an empty exercise." *Id.* at 73 (citing 12 *Moore's Federal Practice*, § 60.24[1] (3d ed. 1997) (hereinafter "*Moore's Federal Practice*")). That same treatise goes on to say:

> The . . . moving party must make allegations that, if established at trial, would constitute a valid claim or defense. . . . [A]llegations attempting to state a claim or defense in this context are "meritorious if they contain 'even a hint of a suggestion' which, if proven at trial, would constitute a [valid claim or a] complete defense." On the other hand, *mere conclusory statements*

> that a claim or a defense is meritorious *will not suffice*. *The moving party must state enough facts to give a court an opportunity to measure whether the claim or defense has any potential*, whether the claim or defense is one that is recognized by law.

Moore's Federal Practice, *supra*, at § 60.24[2] (emphases added; footnotes omitted). That language is clear. The moving party need only state the factual basis for his alleged meritorious claim or defense. That statement need not rise to the level of admissible or persuasive evidence.

[16] We acknowledge that the Airport Authority's position appears to be supported by precedent. Most notably, in *Bross v. Mobile Home Estates, Inc.*, 466 N.E.2d 467, 469 (Ind. Ct. App. 1984), this Court held that the moving party under Trial Rule 60(B) must present "some admissible evidence" of a meritorious claim or defense to obtain relief from a default judgment. That rule has since been repeated. *See Denny v. Vanoy*, 148 N.E.3d 1144, 1146 (Ind. Ct. App. 2020); *Southside Auto. of Anderson, Inc. v. Smith*, 114 N.E.3d 551, 554-55 (Ind. Ct. App. 2018); *Butler v. State*, 933 N.E.2d 33, 36 (Ind. Ct. App. 2010); *Bunch v. Himm*, 879 N.E.2d 632, 637 (Ind. Ct. App. 2008); *Bennett v. Andry*, 647 N.E.2d 28, 35-36 (Ind. Ct. App. 1995); *Ind. Dep't of Nat. Res. v. Van Keppel*, 583 N.E.2d 161, 163 (Ind. Ct. App. 1991), *trans. denied*; *see also Chelovich v. Ruff & Silvian Agency*, 551 N.E.2d 890, 892 (Ind. Ct. App. 1990) (applying the same rule to a motion for relief from the dismissal of the complaint). As support for its rule, *Bross* cited a 1957 opinion of our Supreme Court, but nowhere in that opinion did our Supreme Court declare that the factual basis for a meritorious defense in a motion to set aside a default judgment must be supported by admissible

evidence. *See Cantwell v. Cantwell*, 237 Ind. 168, 143 N.E.2d 275 (1957). *Bross* also cited a 1982 opinion from our Court, which likewise does not articulate any such rule. *See Plough v. Farmers State Bank*, 437 N.E.2d 471 (Ind. Ct. App. 1982). Therefore, we conclude that *Bross* misstated the authorities on which it relied and, thus, that our opinions relying on the *Bross* admissible-evidence requirement have been misplaced.

[17] While the rule from *Bross* has persisted in our case law, in another line of cases we have rejected that rule. In particular, in *Shane v. Home Depot USA, Inc.*, 869 N.E.2d 1232, 1238 (Ind. Ct. App. 2007), we held that the moving party under Trial Rule 60(B) is not required to present admissible evidence to show a meritorious claim or defense to set aside a default judgment, and we expressly disagreed with case law to the contrary. As we explained:

> In our opinion, it is well within the trial court's discretion to determine whether . . . the nature of evidence presented in support of a motion to set aside judgment indeed satisfies the meritorious defense requirement of a *prima facie* showing. We emphasize that "prima facie" means "sufficient to establish a fact or raise a presumption unless disproved or rebutted." Black's Law Dictionary 1228 (8th ed. 2004). This is an appropriate burden, particularly because this type of hearing usually occurs during the initial stages of a case, making the acquisition and preparation of admissible evidence especially difficult. Furthermore, Trial Rule 60(B)(2) states that a party must "allege" a meritorious defense but provides no further guidance as to what constitutes a proper allegation under the rule. It is up to the trial court to determine on a case-by-case basis whether a movant has succeeded in making a *prima facie* allegation.

Id. Thus, in *Shane* we held that the moving party need only state a factual basis for the purported meritorious claim or defense. *See id.* The rule from *Shane* has also appeared in several of our Court's subsequent opinions. *See, e.g.*, *KWD Industrias*, 129 N.E.3d at 282; *Kretschmer v. Bank of America, N.A.*, 15 N.E.3d 595, 601 (Ind. Ct. App. 2014), *trans. denied*; *Goodson v. Carlson*, 888 N.E.2d 217, 222 n.9 (Ind. Ct. App. 2008); *see also Baker & Daniels, LLP v. Coachmen Indus., Inc.*, 924 N.E.2d 130, 142 (Ind. Ct. App. 2010) (applying the same rule to a motion for relief from the dismissal of the complaint), *trans. denied*.

[18] We conclude that our opinion in *Shane* corresponds with the Indiana Supreme Court's guidance in *Outback Steakhouse* and *Smith v. Johnston*. Trial Rule 60(B) provides that a movant "must allege a meritorious claim or defense" when he seeks relief under Rule 60(B)(1); while mere conclusory statements will not suffice under the Rule, neither must the movant *prove* an asserted meritorious claim or defense. Rather, as stated in *Moore's Federal Practice*, such allegations may be satisfied when the moving party "state[s] enough facts to give a court an opportunity to measure whether the claim or defense has any potential." *Moore's Federal Practice*, *supra*, at § 60.24[2]. And, as we stated in *Shane*, it is for the trial court to determine whether the moving party has such a *prima facie* showing. 869 N.E.2d at 1238.

[19] Here, our conclusion is also consistent with Trial Rule 60(B) as a procedural mechanism for the trial court to exercise its equitable authority, within its discretion, based on the facts and circumstances before the court. *See, e.g.*, *Ryan v. Ryan*, 972 N.E.2d 359, 370 (Ind. 2012). A Trial Rule 60(B)(1) motion for

relief from judgment is a prayer for temporary equitable relief, not a final judgment, and, as such, it is addressed to the sound discretion of the trial court and requires the court to assess whether it would be "unjust to allow the judgment to stand." *Outback Steakhouse*, 856 N.E.2d at 73-74 (quoting *Smith*, 711 N.E.2d at 1265). A Rule 60(B)(1) motion, at least when used to seek relief from a default judgment, contemplates an eventual trial or hearing on the merits, at which the moving party will be required to prove the facts alleged in the motion by competent evidence. In this respect, a Rule 60(B)(1) motion for relief from a default judgment is more akin to motion practice under Rule 12(B)(6) than summary judgment practice under Rule 56(C). *See Shane*, 869 N.E.2d at 1238.

[20] Therefore, we hold that, to successfully allege a meritorious claim or defense pursuant to Rule 60(B), a party seeking relief from a default judgment must state a factual basis for his purported meritorious claim or defense, but at this initial stage such a showing is not governed by the rules of evidence.[3] Our conclusion is consistent with the manner in which the trial court applied Rule 60(B) in this case, and, thus, the court did not err as a matter of law in its application of the Rule.

[3] Of course, a party may be well advised to present admissible evidence, if available, in support of a motion to set aside a default judgment under Trial Rule 60(B).

Issue Two: Whether the Trial Court Abused its Discretion in Setting Aside the Default Judgment

[21] We next turn to the Airport Authority's argument that the trial court abused its discretion in setting aside the default judgment.

> A grant of equitable relief under Ind. Trial Rule 60 is within the discretion of the trial court. An abuse of discretion occurs when the trial court's judgment is clearly against the logic and effect of the facts and inferences supporting the judgment for relief. When reviewing the trial court's determination, we will not reweigh the evidence.

KWD Industrias, 129 N.E.3d at 280 (internal citations omitted). "An abuse of discretion will not have occurred so long as there exists even slight evidence of mistake, surprise, or excusable neglect." *Destination Yachts, Inc. v. Pierce*, 113 N.E.3d 645, 655 (Ind. Ct. App. 2018) (citing *Stemm v. Estate of Dunlap*, 717 N.E.2d 971, 974 (Ind. Ct. App. 1999)). "The burden is on the movant to establish grounds for Trial Rule 60(B) relief." *Id.*

[22] Kochenower's motion to set aside the default judgment made a *prima facie* showing of a meritorious defense under Rule 60(B), namely, that he was a victim of identity theft and, therefore, was not the person who opened the Chase Bank account that had been used to defraud the Airport Authority. The factual basis for Kochenower's defense included his June 2 letter to the court, the apparent letter from Chase Bank, and the apparent incident report. In other words, Kochenower stated enough facts for the trial court to measure whether his defense has "any potential," *see Moore's Federal Practice*, *supra*, at § 60.24[2];

for the court to doubt the propriety of the default judgment, *see Allstate Ins. Co.*, 747 N.E.2d at 547; for the court to determine that to vacate the default judgment will not be an empty exercise, *see Outback Steakhouse*, 856 N.E.2d at 73; and for the court to conclude that, under the facts alleged, if credited, a different result would be reached and it would be unjust to allow the judgment to stand, *see id.* at 74. Thus, we hold that the trial court's judgment is not clearly against the logic and effect of the facts and circumstances supporting relief from the default judgment, and we affirm the trial court.

[23] Affirmed.

Riley, J., and Crone, J., concur.